No. 89-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,

Respondents.

On Writ of Certiorari
to the Supreme Court of Nebraska

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

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Respondents and *amici* National Conference of State Legislatures, *et al.* ("NCSL") acknowledge, as they must, that the dormant Commerce Clause imposes specific obligations and restraints upon states; among other things, it prohibits a state from imposing greater taxes or more onerous regulations on persons and companies engaging in interstate commerce who are based outside the state than on comparable persons and companies based in the state or engaged

only in intrastate commerce.[1] Respondents[2] also acknowledge that adversely affected persons, such as petitioner, may enforce those obligations and restraints through the courts by obtaining declaratory and injunctive relief and, in some circumstances, monetary redress.[3] *See McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco*, 110 S. Ct. 2238 (1990). Nevertheless, respondents maintain that the Commerce Clause does not secure any "rights, privileges or immunities" in individuals to engage in interstate commerce free of discriminatory state taxes and regulations—at least not within the meaning of 42 U.S.C. § 1983.

The proposition that legally enforceable protections are not legal "rights," "privileges" or "immunities" is one that is certainly at odds with the common understanding and usage of those terms.[4] Sometimes, of course, common understanding must give way to compelling contrary evidence, or to a long and consistent history of contrary precedent or usage. In this case no such evidence or decisional history exists. On

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[1] Resp. Br. 14; NCSL Br. 6-7, n.3.

[2] Respondents and NCSL generally take the same positions and advance the same arguments in their briefs. Unless otherwise specified, references in this Reply Brief to respondents are intended to include NCSL as well.

[3] Resp. Br. 24-25; NCSL Br. 6-7, n.3.

[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977) (referring to and enforcing the plaintiffs' "right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business"). *See also Davis v. Passman*, 442 U.S. 228, 239 (1979), where the Court observed: "The concept of a 'cause of action' is employed specifically to determine who may judicially enforce . . . *rights* or obligations." (emphasis supplied.)

the contrary, respondents' strained arguments not only defy the plain language of the statute but would require this Court to reverse course and to disavow many lines of decisions applying § 1983 and the Commerce Clause and determining individual rights in analogous contexts.

I. INDIVIDUALS ARE THE INTENDED BENEFICIARIES OF THE COMMERCE CLAUSE

Respondents and petitioner agree that the considerations to be applied in determining whether a constitutional or statutory provision establishes "rights, privileges or immunities" enforceable under § 1983 were described in *Golden State Transit Corp. v. City of Los Angeles*, 110 S.Ct. 444 (1989), where the Court stated:

> In deciding whether a federal right has been violated, we have considered whether the provision in question creates obligations binding on the governmental unit or rather "does no more than express a congressional preference for certain kinds of treatment." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 19 (1981). The interest the plaintiff asserts must not be "too vague and amorphous" to be "beyond the competence of the judiciary to enforce." *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-432 (1987). We have also asked whether the provision in question was "inten[ded] to benefit" the putative plaintiff. *Id.*, at 430; *see also id.*, at 433 (O'Connor, J., dissenting) (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)).

110 S. Ct. at 448.[5] Respondents further agree with petitioner that the Commerce Clause satisfies the first two considerations the Court identified—*i.e.*, it creates binding obligations and it is not so vague and amorphous as to be beyond the competence of the judiciary to enforce.[6]

Respondents, however, contend that the Commerce Clause does not satisfy the third consideration the Court identified—and thus does not create "rights" enforceable under § 1983—because, they assert, it was not intended to benefit individuals.[7] Instead, respondents contend that the "primary objective of the Commerce Clause is to ensure national political and economic union"[8] and that it provides only "indirect and incidental benefit[s]" to persons engaged in interstate commerce.[9]

This contention, which appears to be the crux of respondents' and NCSL's arguments, is plainly erroneous on several counts. First, it is simply not true that the Commerce Clause was not adopted for the benefit of individuals. Indeed that contention was directly and expressly rejected in *Morgan v. Virginia*, 328 U.S. 373 (1946), a decision which respondents largely ignore. In upholding an interstate bus passenger's challenge to a state statute requiring racial segregation on interstate buses, the Court stated une-

[5] Resp. Br. 9; NCSL Br. 6-7. NCSL also cites *Wilder v. Virginia Hospital Ass'n*, 110 S.Ct. 2510, 2517 (1990), which reaffirmed and applied the considerations identified in *Golden State*.

[6] Resp. Br. 14, 24-25 & nn. 70, 71; NCSL Br. 6-7 & n.3.

[7] Resp. Br. 11-13; NCSL Br. 6-8.

[8] Resp. Br. 16, NCSL Br. 15.

[9] Resp. Br. 20, 21; NCSL Br. 15.

quivocally: "Constitutional protection against burdens on commerce *is for her benefit* . . . ." *Id.* at 376-377 (emphasis supplied). *See also People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152, 160 (1907) (referring to persons entitled to challenge state laws under the Commerce Clause as "belong[ing] to the class for whose sake the constitutional protection is given, or the class primarily protected").

Respondents' contention is also inconsistent with the conclusion implicit in the scores of other cases over the past century and a half in which this Court has upheld the right of individuals to enforce in court the restraints the Commerce Clause imposes on the states. In determining whether private individuals may bring legal actions to enforce constitutional or statutory provisions, the principal consideration the Court applies is whether or not the provision in question was intended to benefit the plaintiff and others similarly situated. *Cort v. Ash*, 422 U.S. 66, 78 (1975). The numerous and consistent decisions of this Court upholding the rights of individuals to enforce the dormant Commerce Clause through private legal actions thus clearly reflect the Court's conclusion that the Commerce Clause was adopted for their benefit.

Second, the dichotomy that respondents posit between the Commerce Clause's alleged purpose to serve the national interest in economic and political union and a purpose to benefit individuals engaged in interstate commerce is a false dichotomy. The fact that constitutional provisions may serve broad national or governmental interests does not mean that they were not also adopted to benefit individual citizens. Indeed the ultimate purpose of the Constitution and each of its provisions was to benefit *people*, not abstractions.

The Court recently made this very point in several closely analogous cases in which it rejected the same kind of dichotomy that respondents posit here. In *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500, 1507 (1989), for example, the Court upheld the right of individuals to seek tax refunds based on the doctrine of intergovernmental tax immunity. Although acknowledging the State's contention that the purpose of the doctrine was to protect governments, the Court said that "it does not follow that private entities or individuals . . . cannot themselves receive the protection of the constitutional doctrine. Indeed, all precedent is to the contrary." Similarly, in *United States v. Munoz-Flores*, 110 S.Ct. 1964, 1970 (1990), the Court rejected the argument that separation-of-powers provisions were not adopted to benefit individuals with the observation that " 'the Constitution diffuses power the better to secure [individual] liberty.' " (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 393 U.S. 579, 635 (1952) (Jackson, J., concurring)).

Third, respondents themselves acknowledge that the Commerce Clause does benefit and protect individuals engaged in interstate commerce, but they argue that it still does not create rights because its individual benefits are, assertedly, only "incidental" and were not the "primary" purpose of the Commerce Clause.[10] Whether or not benefitting individuals engaged in commerce was the "primary" purpose of the Commerce Clause is debatable but irrelevant. Nothing in this Court's decisions suggests that whether a provision creates rights turns on whether its purpose to benefit individuals is better characterized as "primary" than as "secondary" or whether its beneficial effects are "direct" or merely "incidental."[11] Any such

[10] Resp. Br. 16, 20.

[11] Respondents and NCSL have cited decisions which have stated or held that a private right of action will not be inferred from a statute if the statute had no purpose to benefit the particular class of whom the plaintiff was a member but was merely intended to benefit the general public and benefitted the plaintiff incidentally only as a member of the general public. Resp. Br. 18, n. 51; NCSL Br. 7 (citing *Golden State, Cort v. Ash*, and *California v. Sierra Club*, 451 U.S. 287 (1981)). These cases do not stand for the proposition that a provision does not create rights if its purpose to benefit a particular class is only one of several purposes but is not its *primary* or *exclusive* purpose, and the proposition for which they are cited has no application here. The class that the Commerce Clause benefits and, as *Morgan* and other cases indicate, was intended to benefit, is not merely the general public but is the particular class of persons who are engaged in interstate commerce. Indeed, the Court has held that unless the plaintiff could show that he was a member of that class, the Court would not consider his challenge to state statutes under the Commerce Clause, no matter how meritorious it might be. *See, e.g., People of State of New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907).

Equally inapposite are cases cited by respondents and NCSL which have stated that the Commerce Clause " 'protects the interstate market, not particular interstate firms.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981) (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978)). Those cases hold that a person or company is not immune from state taxation or regulation merely because it engages in interstate commerce and that a state tax or law that applies equally and without discrimination to all persons is not unconstitutional merely because it happens to fall more heavily on out-of-state persons or on persons engaged in interstate commerce. Those cases do not hold that the Commerce Clause does not protect individuals engaged in interstate commerce clause from discriminatory state taxes or laws—*i.e.*, from laws or taxes that fall more heavily on them *because* they engage in interstate

test, moreover, would engage the courts in an endless exercise of metaphysical and ultimately fruitless hair-splitting. The fact is that most constitutional provisions can be viewed as having multiple purposes and benefits, and which of those was more important than others in the minds of the Framers is simply not determinable.

In sum, the Commerce Clause was intended to benefit not only abstract national interests but also the concrete interests of individuals like petitioner in engaging in interstate commerce free of discriminatory state taxes and regulations. Under all of the factors identified in *Golden State*, therefore, it creates rights, privileges and immunities which may be enforced under 42 U.S.C. § 1983.[12]

II. PETITIONER HAS NOT EQUATED "STANDING" WITH "RIGHTS"

Respondents erroneously assert that petitioner has confused the concept of standing with the concept of rights, and they argue at some length that he has mistakenly contended that a person's standing to invoke the Commerce Clause is equivalent to his having a right secured by the Commerce Clause.[13] Respondents seriously misstate petitioner's argument. Petitioner has never argued that standing alone is equivalent to a right. Obviously, under the test for

commerce or are from outside the state. Numerous decisions, of course, establish that the Commerce Clause does protect such individuals.

[12] *See* Note, *Dormant Commerce Clause Claims Under 42 U.S.C. §1983: Protecting the Right To Be Free of Protectionist State Action*, 86 Mich. L. Rev. 157 (1987).

[13] Resp. Br. 10-11, 24-32; NCSL Br. 5-9.

standing[14] a person may have standing to assert a right that he or she may ultimately be found not to have. Similarly, a person asserting a non-frivolous claim of right under the Constitution may obtain federal court jurisdiction under 28 U.S.C. § 1331, which provides jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States," even though the federal court may ultimately reject his or her claim of right on the merits. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-683 (1946).

What petitioner has contended is that, under this Court's decisions, a provision secures individual rights if the individual has standing to invoke the provision *and* if he or she is entitled to relief under it—*i.e.*, if the person may not only invoke the provision but also enforce it. *See* Pet. Br. 24-26. In short, standing is a necessary but not sufficient element of what constitutes an individual right. Petitioner's contention that the Commerce Clause secures individual rights is based on the many cases holding that individuals may not only assert the protections of the Commerce Clause but also enforce them.[15]

[14] *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 396 (1987); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970) (whether the plaintiff's claim is "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question").

[15] Since petitioner has never contended otherwise, respondents' argument that cases like *Carter v. Greenhow*, 114 U.S. 317 (1885), and *Bowman v. Chicago & Northwestern Ry. Co.*, 115 U.S. 611 (1885), show that standing to assert a claim and the ability to obtain federal jurisdiction under 28 U.S.C. § 1331 do not establish the existence of an enforceable right (Resp. Br.

In this regard, respondents are also seriously mistaken in characterizing and dismissing *Boston Stock Exchange* and *Morgan v. Virginia* as having done nothing more than establishing the standing of certain plaintiffs to challenge state actions under the Commerce Clause.[16] Those cases did not merely uphold the standing of the plaintiffs to assert the Commerce Clause; they upheld the plaintiffs' claims on the merits and enforced what the Court in *Boston Stock Exchange* expressly referred to as their "right under the Commerce Clause" to engage in interstate commerce

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26-28) is simply irrelevant to the question at issue.

Nor is there any merit to respondents' and NCSL's contention that *Carter* and *Bowman* support their claim that the Commerce Clause does not create "rights" within the meaning of § 1983. Resp. Br. 29; NCSL Br. 26-28. *Carter* did not involve the Commerce Clause at all, but concerned the Contracts Clause of Article I, § 10. Moreover, the Court did not hold that the Contracts Clause did not secure rights to individuals but simply that the plaintiff had failed to allege a deprivation of those rights. Indeed, the Court held that that Clause does secure individual rights, namely, the right to a judicial determination of the invalidity of a contractual impairment, but stated: "But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." 114 U.S. at 322. Justice Stone thus accurately described *Carter* as having rejected the plaintiff's claim "as a matter of pleading." *Hague v. CIO*, 307 U.S. 496, 527 (1939) (opinion of Stone, J.).

In *Bowman*, the Court did not indicate which provision of the Constitution was asserted, but in any event it simply held that the plaintiff's suit against a railroad for refusal to carry his goods was based on his rights under the state law of common carriage, not on any rights under the Constitution. 115 U.S. at 615.

[16] Resp. Br. 24; NCSL Br. 17.

free of discriminatory state taxes and laws. 429 U.S. at 320 n.3.

Nor is there any substance to NCSL's attempt (NCSL Br. 16) to dismiss the references in *Boston Stock Exchange*, *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967), *Western Union Tel. Co. v. State of Kansas*, 216 U.S. 1, 21 (1910), and *United States v. Guest*, 383 U.S. 745, 757, 760 (1966), to the "rights" of individuals under the Commerce Clause as merely a description of "rights" in other contexts but not a determination of "rights" within the meaning of § 1983. In other words, according to NCSL, what may be a "right" generally or in other contexts is not a "right" under § 1983. There is no basis in the legislative history of § 1983 or in this Court's decisions, however, for concluding that Congress intended a specialized meaning for the term "rights" in § 1983 that is different from and significantly narrower than the meaning of that term in other contexts. NCSL's effort to engraft a unique vocabulary onto § 1983 jurisprudence is without merit.[17]

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[17] Respondents make a similar but equally baseless attempt to distinguish cases like *United States v. Munoz-Flores*, *Davis v. Michigan Dep't. of Treasury* and *Bowsher v. Synar*, 478 U.S. 714 (1986). As discussed in petitioner's opening brief (Pet. Br. 26-29), those cases held that other constitutional provisions and doctrines allocating governmental powers created enforceable "individual rights." *See Munoz-Flores*, 110 S.Ct. at 1970. Respondents distinguish those cases on the ground that they did not involve claims under § 1983 (Br. 24, n.68), but respondents do not explain why the term "rights" as used in §1983 has a different meaning from the term this Court has used to describe individual protections under the Origination Clause, Art. I, § 7, cl. 1, or other separation of powers provisions and doctrines.

Finally, NCSL is simply wrong in contending (Br. 26) that "[i]f petitioner is correct in contending that plaintiffs may rely on Sections 1983 and [28 U.S.C. §] 1343(3) whenever they have standing to challenge a violation of the Constitution, the federal question statute would have been unnecessary (and the jurisdictional amount requirement nugatory) from the outset, at least in constitutional litigation." Section 1331 of Title 28 gives federal courts jurisdiction over any claim of right arising under the Constitution and federal laws, regardless of the parties involved. Section 1983, in contrast, was enacted as a special remedy for certain limited kinds of constitutional and statutory violations—those committed under color of state law—and § 1343(3) was enacted to give federal courts jurisdiction only over those types of violations.[18] Section 1331 was necessary to provide jurisdiction over all the many other controversies involving federal questions.

III. CONGRESS' POWER UNDER THE COMMERCE CLAUSE DOES NOT PRECLUDE PETITIONER'S RIGHTS UNDER THAT CLAUSE

Respondents also argue that individuals can have no "rights" under the dormant Commerce Clause because Congress has the power to alter or abolish those rights.[19] This argument is meritless. In the absence of legislation by Congress, individuals have an enforceable right under the Commerce Clause to engage in interstate commerce free of discriminatory state

[18] Furthermore, § 1343(3) gives jurisdiction only with respect to violations of certain kinds of federal statutes—those "providing for equal rights."

[19] Resp. Br. 21; NCSL Br. 10.

taxes and regulations. The fact that existing rights to engage in a particular activity or to be free of particular restraints may be subject to alteration by Congress in the future does not make them any the less "rights" within the meaning of § 1983. Indeed, all federal statutory rights that are actionable under § 1983 against state violators are subject to future alteration or repeal by Congress.[20]

IV. THE LEGISLATIVE HISTORY OF § 1983 DOES NOT SUPPORT RESPONDENTS

Respondents' reliance on the legislative history of § 1983 rests mainly on certain remarks of Representative Shellabarger.[21] Petitioner addressed these in his opening brief (Pet. Br. 33-34) and will repeat only one point here for emphasis. *Nowhere* in his remarks did Representative Shellabarger make any reference to the Commerce Clause, and there is no basis for imputing to him or to any other legislator the view that state violations of the Commerce Clause, such as the segregation law struck down in *Morgan v. Virginia*, would not be redressable under § 1983.

Respondents' claim (Br. 39-40) that "postenactment history" supports their position is groundless. The 1980 legislation respondents refer to had no connec-

[20] The same is true of many constitutional provisions. Even though individuals may not have an absolute right to engage in a particular activity, they have a constitutional right to the legislative and judicial processes that the Constitution requires as a condition of regulating or prohibiting that activity. For example, aliens have no absolute right not to be deported, but they do have a right not to be deported except by legislation enacted pursuant to constitutional requirements. *INS v. Chadha*, 462 U.S. 919 (1983).

[21] Resp. Br. 33-35; NCSL Br. 23-24.

tion with § 1983 but merely eliminated the $10,000 amount in controversy requirement of 28 U.S.C. § 1331 in federal question cases. Respondents base their argument entirely on a passing remark by Professor Charles Wright in one of the letters supporting the legislation.[22] Contrary to respondents' assertion, however, Professor Wright did not state that "there was a serious doubt" that a Commerce Clause claim could be brought under 28 U.S.C. § 1343. He merely stated that, as one of many reasons for eliminating the jurisdictional amount requirement in § 1331, "it is not yet clear" that such an action could be brought under § 1343. The notion that Congress eliminated the jurisdictional amount requirement in § 1331 because of this remark or because of any doubts about federal court jurisdiction over Commerce Clause claims under $10,000 is simply fanciful.

V. RESPONDENTS' POLICY ARGUMENTS ARE WRONG AND ARE ADDRESSED TO THE WRONG FORUM

Respondents and NCSL advance a number of policy arguments to the effect that recognition of a cause of action under § 1983 for Commerce Clause violations is unnecessary and/or undesirable. These arguments are both incorrect and addressed to the wrong forum. If Congress wishes to limit the scope of §§ 1983 or 1988 it may. To date, however, Congress has chosen not to alter this Court's consistently broad construction of those statutes.

1. Respondents argue that § 1983 is unnecessary to ensure adequate enforcement of the Commerce Clause because Commerce Clause claims have been litigated many times without § 1983 and because those claims

[22] *See* S. Rep. No. 827, 96th Cong., 2d Sess. 12-16 (1980).

are "generally economic in nature" and are asserted on behalf of "business interests" who "do not need the economic incentive of attorneys fees to prosecute Commerce Clause claims."[23] In *Lynch v. Household Finance Corp.*, 405 U.S. 538, 542 (1972), however, this Court squarely rejected the contention that § 1983 only applied to "personal" rights, and not to "economic" or "property" rights. Furthermore, Commerce Clause claims do not always involve solely economic interests, as *Morgan v. Virginia* shows.

The fact that Commerce Clause claims have been litigated previously without reliance on § 1983 is plainly irrelevant. Many other constitutional and statutory rights that this Court has held to be enforceable under § 1983 have also been litigated and vindicated without resort to that provision. Respondents' opinion that Commerce Clause claimants do not need the incentive of the attorneys' fees provided by § 1988 is both groundless and irrelevant. In cases like this one, where the monetary impact on each individual is relatively small and where state procedures foreclose the recovery of fees from the benefitted class, the availability of fees can well determine the feasibility of bringing legal action to vindicate one's rights. Moreover, whether or not business associations, civil rights organizations or other public interest groups might undertake litigation against constitutional and statutory violators even without the possibility of recovering their fees is immaterial to the scope of § 1983. Congress enacted § 1988 not only to help ensure the private vindication of federal rights but also to fully redress persons for all of the costs resulting from the violation of those rights.

[23] Resp. Br. 40, 43.

2. Respondents' claim that § 1983 would impose substantial and undue burdens on states is also incorrect. The only additional cost such a result would impose on states is the legal expenses that their unconstitutional actions required people to incur to protect constitutional rights. That burden is minimal. In this case, it would serve only to reduce by a small fraction the profit that Nebraska managed to make by collecting unconstitutional retaliatory taxes during the five years the suit was pending in its courts.[24]

Nor is there any basis for NCSL's claim (Br. 29-30) that recognizing a § 1983 cause of action will dramatically change the character of Commerce Clause litigation. Recognizing a § 1983 cause of action will not expose states and state treasuries to damages,[25] and will have no effect on where Commerce Clause claims are litigated. The Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, will bar federal courts from entertaining many, if not most Commerce Clause claims, and where they do not apply federal courts would have jurisdiction under 28 U.S.C. § 1331 regardless of § 1983. Furthermore, contrary to NCSL's claim (Br. 30), § 1983 does not prevent states from applying "neutral state rules" with respect to constitutional challenges to state taxes in

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[24] Respondents' suggestion that the prospect of personal liability under § 1983 will deter state officials from "adopting innovative policies" (Resp. Br. 44) is also baseless. Individuals are shielded from personal liability by the doctrine of qualified immunity for actions taken in good faith and they should not be shielded from those taken in bad faith.

[25] *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989).

state courts. *Howlett v. Rose*, 110 S.Ct. 2430, 2440 (1990).

VI. THERE IS NO WARRANT FOR REMANDING THE § 1983 ISSUE TO THE NEBRASKA SUPREME COURT

Finally, respondents have contended that if this Court concludes that Commerce Clause challenges to state taxes are "generally cognizable" under § 1983, it should remand the case to the Nebraska courts for them to consider whether they are required to entertain the § 1983 claim.[26] Such a remand is unwarranted for two reasons. First, contrary to respondents' claims, this Court squarely held last term in *Howlett v. Rose* that state courts are required to entertain § 1983 claims unless they are barred by some "neutral state rule regarding the administration of the courts," such as the doctrine of *forum non conveniens*. Respondents have not suggested any neutral state rule that might have barred the § 1983 claim in this or any other similar case. They have only suggested that the Nebraska courts might not wish to enforce the federal remedies, which is a motive that this Court in *Howlett* held to be impermissible. 110 S.Ct. at 2445.[27]

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[26] Rep. Br. 45-49.

[27] Although respondents cite *Howlett*, they appear to have overlooked its clear holding that "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.'" 110 S.Ct. at 2439 (quoting *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377, 387-388 (1929)). Although respondents cite *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 n.7 (1987), as indicating that the question remained open whether state courts are required to entertain § 1983 claims, that question was answered unequivocally in *Howlett*. It may also be noted that on

Second, the Nebraska Supreme Court itself has specifically held that its courts will entertain § 1983 actions and that state sovereign immunity is not a bar to such actions. *Maldonado v. Nebraska Department of Public Welfare*, 223 Neb. 485, 391 N.W.2d 105, 110 (1986).

CONCLUSION

The judgment of the Supreme Court of Nebraska should be reversed.

Respectfully submitted,

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remand in *Ragland* the Arkansas Supreme Court held that it would entertain the § 1983 claim and remanded the case to the trial court for determination of attorneys' fees pursuant to § 1988. *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402, 403 (1987).